Malakoff Bhd & Anor v Pentadbir Tanah, Kedah

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01–OF 2002 (K)

HAIDAR CJ (MALAYA), ABDUL MALEK AHMAD AND ABDUL HAMID MOHAMAD FCJJ

11 DECEMBER 2003

Land Law — Acquisition of land — Compensation — Rejection of compensation offered — Objections to award raised question of damages for injurious affection — Reference to court — Claim for injurious affection raised before High Court — High Court noted claim for injurious affection but made no award on it — Whether claim for injurious affection ought to be considered on appeal

Land Law — Acquisition of land — Objection against amount of compensation awarded — Cross-objection on amount of compensation awarded — Whether Land Administrator could be 'a person interested' in the land — Whether Land Administrator could make an objection on the amount awarded based on fresh evidence — Land Acquisition Act 1960 ss 37(1) & (3), 49(1)

A large portion of the appellants' land was acquired for the stated purpose of resolving squatter problems in Sg Petani. Gazette notification having been published on 3 March 1994, this was the relevant date for the purpose of determining the market value of the land. As at the date of acquisition, there had been no application by the appellants for the development of the land. The Land Administrator determined that compensation ought to be paid to the appellants based on RM10,000 per acre. The appellants claimed that the sum awarded was not reflective of the market value of the land. The trial judge considered the market value of the land based on the comparison of sales method used by the both parties. The trial judge also noted that an area of some 1.55 acres of land located immediately at the south-east corner of the acquired land would be cut off from the remaining part of the appellants' land and administration of this area would be difficult. There would be a depreciation of about 30% of the open market value of this land. However, the trial judge the refused to increase the award in respect of the acquisition of the appellants' land and made no award for the appellants' claim for injurious affection. The appellants appealed. The respondent cross-appealed, claiming that the appellants had been over-compensated by the award. The appellants objected to the cross-appeal, arguing that the award upheld and maintained by the High Court was one made by the respondent. The Land Administrator was not a 'person interested' within the meaning of s 37 of the Land Acquisition Act 1960 ('the Act'). The award of the Land Administrator, as the agent of the Government, was final and conclusive of the value of the land and binding on the Government.

Held, allowing the appeal in part by making an award of RM5,000 for injurious affection, dismissing the appeal for an increase of the award, allowing the cross-appeal and reducing the award to RM7,500 per acre:

(1) The respondent as the Land Administrator cannot invoke s 37 of the Act. If the appellants himself had not invoked s 37 of the Act by objecting to the amount of compensation awarded, the matter rests there and the respondent cannot proceed further. The award made by the Land Administrator is then final and conclusive and was binding on the Government. To that limited extent, counsel for the appellants may be right (see paras 52 – 53). *Hamidon bin Ahmad v Collector of Land Revenue, Jasin* [1970] 1 MLJ 202 and *Ezra v Secretary of State for India* (1905) ILR 32 Cal 605 PC distinguished .

(2) However, in this case, the appellants had proceeded to file an appeal against the judgment of the High Court. The respondent was thus entitled to also file an appeal or a cross-appeal. This right is amply given to the respondent by way of s 49(1) of the Act. It is, however, noted that without the benefit of the further evidence, the respondent would be hard put to cross-appeal as the sum of RM10,000 per acre was the sum awarded by the respondent as the Land Administrator (see paras 53 – 54).

(3) For reasons best known to the first appellant, certain evidence was not disclosed though the documents were available. Had the trial judge the benefit of these documents in support of the respondent's cross-appeal, the trial judge could very well have not affirmed the award of RM10,000 per acre. The trial judge's valuation of the market value of the scheduled land was based on the valuation reports of both parties before him and no oral evidence was adduced. The appellate court was thus entitled to review the valuation reports and to consider the appeal based on the additional evidence before it (see paras 68, 69 – 70).

(4) Taking into consideration the element of appreciation of the scheduled land, etc, a fair market value of the scheduled land was RM7,500.00 per acre. Taking the basis of the claim for injurious affection on the formula of 30% depreciation of the value of the scheduled land, the amount for the injurious affection would work out to around RM5,000 (see paras 75 – 76).

[Bahasa Malaysia summary

Sebahagian besar tanah defendan telah diperoleh untuk tujuan menyelesaikan masalah setinggan di Sg Petani. Pemberitahuan Gazette yang telah diterbit pada 3 Mac 1994, ini adalah tarikh yang relevan untuk tujuan menentukan nilai pasaran tanah itu. Pada tarikh perolehan, tiada permohonan oleh pearyu-perayu untuk pembangunan tanah itu. Pentadbir Tanah telah menentukan pampasan yang perlu dibayar kepada perayu berdasarkan RM10,000 seekar. Perayu-perayu menyatakan bahawa jumlah itu tidak menunjukkan nilai pasaran tanah itu. Hakim perbicaraan telah mempertimbangkan nilai pasaran berdasarkan kaedah perbandingan jualan yang digunakan kedua-dua parti. Hakim perbicaraan juga telah membuat pemerhatian bahawa kawasan sebanyak 1.55 ekar tanah terletak betul-betul

di sudut tenggara tanah yang diperoleh itu akan diasingkan daripada tanah perayu-perayu yang laindan pentadbiran kawasan itu akan menjadi susah. Akan terdapat pengurangan nilai sebanyak 30% nilai pasaran terbuka tanah itu. Walau bagaimanapun, hakim perbicaraan enggan meningkatkan award berkait dengan perolehan tanah perayu dan tidak membuat apa-apa award untuk tuntutan gangguan mudarat perayu-perayu. Perayu-perayu merayu. Responden telah merayu balas, menuntut bahawa perayu-perayu telah terlebih dipampas oleh award itu. Perayu-perayu membantah kepada rayuan balas itu menyatakan bahawa award yang disahkan dan dikekalkan oleh Mahkamah Tinggi dibuat oleh responden. Pentadbir Tanah bukan merupakan seorang 'person interested' seperti di dalam s 37 Akta Pengambilan Tanah 1960 ('Akta itu'). Award Pentadbir Tanah, sebagai agen Kerajaan, adalah muktamad mengenai nilai dan mengikatkan Kerajaan.

Diputuskan, membenarkan sebahagian daripada rayuan dengan membuat award untuk RM5,000 untuk gangguan mudarat, menolak rayuan untuk peningkatan award, membenarkan rayuan balas dan mengurangkan award itu kepada RM7,000 seekar:

(1) Responden, sebagai Pentadbir Tanah tidak boleh menggunakan s 37 Akta itu. Jika perayu-perayu sendiri tidak menggunakan s 37 Akta itu dengan membantah kepada jumlah pampasan yang diawardkan, perkara itu selesai dan responden tidak dapat terus dengan perkara itu. Award oleh Pentadbir Tanah adalah muktamad dan mengikatkan Kerajaan. Setakat itu, peguam untuk perayu mungkin betul (lihat perenggan-perenggan 52 dan 53). *Hamidon bin Ahmad v Collector of Land Revenue, Jasin* [1970] 1 MLJ 202 dan *Ezra v Secretary of State for India* (1905) ILR 32 Cal 605 dibeza .

(2) Walau bagaimanapun, di dalam kes ini, perayu-perayu telah terus memfailkan rayuan terhadap penghakiman Mahkamah Tinggi. Responden juga berhak memfailkan rayuan atau rayuan balas. Hak telah diberi kepada responden melalui s 49(1) Akta itu. Mesti diperhatikan bahawa tanpa keterangan yang lain, responden akan mengalami masalaj membuat rayuan balas kerana jumlah RM10,000 se ekar adalah jumlah yang diawardkan oleh responden sebagai Pentadbir Tanah (lihat perenggan-perenggan 53 dan 54).

(3) Melalui alasan-alasan yang hanya diketahui perayu pertama, keterangan tertentu tidak didedahkan melalui dokumen-dokumen yang sedia ada. Jika hakim perbicaraan mempunyai dokumen-dokumen itu menyokong rayuan balas responden, hakim perbicaraan mungkin tidak mengesahkan award RM10,000 seekar itu. Penilaian hakim perbicaraan nilai pasaran tanah yang dijadualkan itu berdasarkan laporan penilaian di hadapan beliau dan tiada keterangan lisan dikemukakan. Mahkamah rayuan berhak mengkaji semula laporan penilaian dan mempertimbangkan rayuan itu berdasarkan keterangan tambahan di hadapannya (lihat perenggan-perenggan 68, 69 dan 70).

(4) Mempertimbangkan elemen peningkatan nilai tanah yang dijadualkan itu, dan lain-lain, nilai pasaran tanah itu yang adil adalah RM7,500 seekar. Mengambil dasar tuntutan untuk gangguan mudarat pada formula 30% pengurangan nilai tanah yang dijadualkan itu, jumlah untuk gangguan mudarat akan berjumlah RM5,000 (lihat perenggan-perenggan 75 dan 76).]

Notes

For cases on compensation in acquistion of land, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1582–1604.

For cases on objections agains amount of compensation awarded, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1673.

Cases referred to

Alagappa Chettiar v Collector of Land Revenue, Kuala Lumpur [1968] 1 MLJ 243 (refd)

Collector of Land Revenue v Alagappa Chettiar [1971] 1 MLJ 43 (refd)

Ezra v Secretary of State for India (1905) ILR 32 Cal 605 (dist)

Hamidon bin Ahmad v Collector of Land Revenue, Jasin [1970] 1 MLJ 202 (dist)

Harish Chundar Neogy v Secretary of State 11 CWN 876 (refd)

Malakoff Bhd & Anor v Pentadbir Tanah, Kedah [2000] 2 MLJ 140 (refd)

Nanyang Manufacturing Co v The Collector of Land Revenue, Johore [1954] MLJ 69 (refd)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35 (refd)

Petaling Rubber Estates Ltd v Collector of Land Revenue, Kedah [1989] 3 MLJ 438 (refd)

Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd [1966] 1 MLJ 243 (refd)

United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications [2003] 1 MLJ 465 (refd)

Legislation referred to

Land Acquisition Act 1960 ss 2, 8, 14(2), 29(2), 36(2), 37(1), 44, 49(1), para 1 of the First Schedule

Rules of the Federal Court 1995 r 137

Wong Chong Wah (Lim Koon Huan with him) (Skrine) for the appellants.

Aziah bte Ali (Ahmad Zakhi bin Mohd Daud with her) (Pejabat Penasihat Undang-Undang, Kedah) for the respondent.

Appeal from: Land Reference No 15– 47–of 1995 (High Court, Alor Setar)

Haidar CJ (Malaya) (delivering judgment of the court):

[1] There were three matters before us. They were:

(1) The notice of motion dated 1 July 2003 for leave to adduce further evidence by the respondent in support of the respondent's cross-appeal.

(2) The appeal by the appellants.

(3) The cross-appeal by the respondent.

[2] We will deal with the matters in the order as set out above.

Notice of motion dated 1 July 2003

[3] The notice of motion was filed after this court granted leave on 16 June 2003 to the respondent to file a cross-appeal in respect of the appeal by the appellants filed on 1 October 2002.

[4] The grounds for the filing of the motion was to adduce further evidence in the form of documents by way of affidavit. With the introduction of the further evidence, the respondent hoped to show that the appellants had been over-compensated by the award of RM10,000 per acre for the acquired land, hence the basis for the respondent's cross-appeal.

[5] Wong Chong Wah of counsel for the appellants at the initial stage of the proceedings objected to the motion. This was borne out by the affidavit in reply of one Ahmad Azhar Shah bin Ibrahim, the Legal and Administrative Manager of Boustead Estates Agency Sdn Bhd, the managing agents of the appellants.

[6] In this affidavit, Ahmad Azhar Shah bin Ibrahim deposed that there was no suppression or deliberate suppression by the appellants and further deposed that the documents relied on by the respondent by way of further evidence in support of the cross-appeal were not required to be produced in the land acquisition proceeding and the respondent had failed to show how the documents were relevant to the cross-appeal before us. The documents referred to were:

(a) the sale of estates, other assets and shares agreement dated 8 October 1993 between the first appellant and Kuala Sidim Rubber Company Bhd ('the Sale and Purchase Agreement');

(b) the first appellant's circular to its shareholders dated 23 February 1994;

(c) Kuala Sidim Rubber Company Bhd's circular to its shareholders dated 3 March 1994;

(d) the official Land Title Search Reports for Lot No 14215 (old Lot No 8065) and Lot No 18479.

[7] The above documents were exhibited as ZBH1, ZBH2, ZBH3 and ZBH4 respectively in the affidavit of Zabudin bin Hat, Chief Assistant Director of Land and Mines, Kedah in support of the motion and the cross-appeal of the respondent.

[8] The same documents were also exhibited in the second affidavit of the respondent through Azmi bin Abdul Latif, a valuation officer of the Jabatan Penilaian dan Perkhidmatan Hartanah, Taiping, Perak Darul Ridzuan who had previously been stationed at the branch office, Sungai

Petani, Kedah Darul Aman and who was responsible for preparing a valuation report for the respondent, (exhs AAL-1 to AAL-4).

[9] In the midst of the submission of Aziah Ali, the learned State Legal Adviser of Kedah appearing for the respondent, Abdul Malek Ahmad FCJ, interjected and intimated to Wong Chong Wah of counsel for the appellants whether he still wished to stand by his objection to the motion as it would clearly be better for the documents to be put in as the said documents would be relied on as the basis for the respondent to argue in the cross-appeal. The appellants would not in anyway be prejudiced and there would be an opportunity for the appellants to argue as per the grounds opposing the motion. It would also save time in arguing all over again in the event the motion was allowed by the court.

[10] Wong Chong Wah of counsel for the appellants relented and withdrew his objection. We accordingly made an order in terms of the motion. We then directed Wong Chong Wah of counsel for the appellants to proceed with the appeal.

The appeal

[11] This court allowed the extension of time for the appellants to appeal against the decision of the High Court due to the uncertainties regarding the appropriate appellate court. Initially the appellants filed their appeal in the Court of Appeal. In fact the Court of Appeal heard their appeal and dismissed it but allowed the claim for injurious affection (see *Malakoff Bhd & Anor v Pentadbir Tanah, Kedah* [2000] 2 MLJ 140). However, this issue has been resolved by this court in the case of *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications* [2003] 1 MLJ 465. In respect of the appellants' case, the proper appellate court was the Federal Court. In the interests of justice, this court similarly allowed the extension of time for the respondent to file a cross-appeal (see r 137 of the Rules of the Federal Court 1995).

[12] This appeal was against the refusal of the learned judge to increase the award of RM10,000 per acre by the respondent in respect of the acquisition of the land belonging to the appellants. The appellants claimed that the sum awarded was not reflective of the market value of the scheduled land. The appellants contended that a sum of RM20,000 per acre should have been awarded instead of RM10,000 per acre. Apart from that, the appellants contended that the learned judge failed to consider the appellants' claim for injurious affection in the sum of RM9,300. The material date for determining the market value of the scheduled land was 3 March 1994. This was the date of the declaration of intended acquisition pursuant to s 8 of the Land Acquisition Act 1960 ('the Act') and published in the Government of Kedah Darul Aman Gazette Notification on 3 March 1994 vide Gazette Notification No 170. The purpose of the acquisition as stated in the Gazette Notification was:

> Pengambilan Tanah Untuk Menyelesaikan Masalah Setinggan di Bandar Sungai Petani.

[13] The scheduled land formed part of Kellang Lama and Home Divisions of Kuala Muda Estate totaling 6,392.16 acres. The scheduled land formed part of Lot Nos 14215 and 18479, Mukim of Sungai Petani, District of Kuala Muda. 1,661.5 acres of Lot No 14215 out of the original area of 1,709.9688 acres and 919.9 acres of Lot No 18479 out of the original area of 940.48 acres were acquired for the stated purpose.

[14] The main contention of the appellants was that the learned judge erred in law and in fact in failing to take into consideration the relevant factors in assessing the market value of the scheduled land.

[15] For a start, the learned judge, in our view, had taken the correct approach in considering the principles in awarding compensation for the acquisition of the scheduled land by referring to the First Schedule to the Act where the compensation was to be determined according to the market value of the scheduled land at the time of the gazette notification. In this case the relevant date was 3 March 1994. As to what was the market value, the learned judge relied on the Federal Court case of *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 as a guide and quoted what Syed Agil Barakbah FJ, stated at p 37:

> There are of course other principles that have to be applied according to the facts and circumstances of a particular case along the lines provided by the First Schedule to the Act and as decided from time to time by the courts. We consider the following as the main principles:
>
> First, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future e.g. the possibility of it being used for building or other developments. Fourthly, in considering the nature of the land regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given unless it is supported by, or coincides with, other evidence. …
>
> The safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition. The prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.

[16] From the notes of the proceedings before the learned judge, no oral evidence was led by either party but the parties relied on the following documents:

(a) the valuation report of the appellants dated 25 April 1994 marked as exh 'A';

(b) the valuation report of the respondent dated 8 August 1995 marked as exh 'B';

(c) the common plan marked as exh 'C';

(d) the affidavit of Azmi bin Abdul Latif, the government valuation officer, filed on behalf of the respondent enclosing the valuation reports dated 6 August 1993 ('first valuation report') and 25 April 1994 ('second valuation report') respectively by Messrs Azmi & Co for the appellants.

[17] Hence, the issue of the credibility of witnesses in this case does not arise in considering the appeal before us.

[18] The following facts as found by the learned judge were not disputed.

[19] 2,581.4 acres out of a total area of 2,650.4488 acres of the scheduled land belonging to the appellants were acquired and the purpose of the acquisition was for 'menyelesaikan masalah setinggan di Bandar Sungai Petani' ('to resolve the squatter problems in the town of Sungai Petani'). As the date of the gazette notification for the acquisition was 3 March 1994, for the purpose of determining the market value of the scheduled land, the relevant date would be 3 March 1994. The scheduled land was freehold and under the category of agriculture. The scheduled land was still under the agriculture zone according to the Kedah Town and Country Planning Department. As at the date of acquisition, there has been no application by the appellants for the development of the scheduled land.

[20] With the above background, the learned judge proceeded to consider the market value of the scheduled land based on the comparison of sales method used by the appellants' valuer as in exh 'A'. Likewise, the respondent's valuer also used the comparable of sales method as in exh 'B'.

[21] From exh 'A', the appellants' valuer put forward four comparable sales. The first comparison was the same as comparison 3 used by the respondent's valuer. It was in respect of Lot 1029 and other lots covering an area of 555.633 acres. The transaction was around RM13,500 per acre on 22 July 1990. After considering in detail and giving the necessary allowances, the learned judge concluded the market value of the scheduled land was RM10,150 per acre. According to the learned judge, this was about the best comparison.

[22] In respect of comparisons 2, 3 and 4, the lands were situated in the District of Kulim and it was clear that the lands were close to Penang which has been developed. According to the learned judge, for comparisons 3 and 4 the transactions took place almost at the same time as comparison 1 and at almost the same price. As stated by the valuer for the appellants,

comparisons 3 and 4 were close to Kulim town and the lands were acquired for the new township of Kulim and were under the Kulim Industrial Zone. If the necessary adjustments were made, the market value at the material date for the purpose of comparison would be the same as comparison 1, that is, RM10,150 per acre.

[23] In respect of comparison 2, the learned judge could not accept the market value based on the sale and purchase agreement dated 9 March 1994, as from exh 'A' the said sale and purchase agreement was not produced and there was no evidence when the transfer took place, if at all. In the circumstances, the learned judge took the view that he could not accept this comparison in assessing the market value of the scheduled land as he was not in a position to consider the terms and conditions of the said sale and purchase agreement.

[24] The respondent as per exh 'B' relied on eight comparisons. For the reasons stated by the learned judge, which we agree, he rejected comparisons 1 and 2 as at the time of the transaction, the lands were already zoned under industrial use.

[25] Comparison 3 was the common comparison by both valuers as stated by the learned judge in his judgment, that is, the market value was RM10,150 per acre.

[26] In respect of comparison 4, after giving due allowances, the learned judge put the market value as RM9,700 per acre for comparison purposes.

[27] The learned judge rejected comparison 6 as the lands were situated far away from the scheduled land and they were in the interior.

[28] According to the learned judge comparisons 5, 7 and 8 were good for comparison as the lands were situated near the scheduled land. For the reasons stated therein, the learned judge concluded that the market value for comparison 5 was RM9,000 per acre.

[29] In respect of comparisons 7 and 8, after giving due allowances in terms of size, type of lands etc, the learned judge assessed the market value as RM8,400 per acre.

[30] After considering the valuation reports of the valuers of both parties, the learned judge came to the finding that the market value of the scheduled land was approximately RM9,000 per acre. The learned judge thereafter commented that the respondent awarded RM10,000 per acre to the appellants which was more than the market value as found by him. In spite of his finding, the learned judge followed the award by the respondent and declined to increase the compensation to the appellants. In declining to increase the award, the learned judge observed that based on the market value as in the report prepared by the same valuer of the appellants (exh 'D') for the purpose of the Securities Commission as RM7,040 per acre, and the award at RM10,000 per acre, the market value of the scheduled land exceeded the Securities Commission valuation by about RM3,000 per acre. Exhibit 'D' was put in by the respondent.

[31] Before us, Wong Chong Wah of counsel for the appellants contended that the learned judge erred in law and in fact in rejecting comparison 2 of the appellants' valuation report (exh 'A') as it was the best comparable indicating the market value of the scheduled land as it involves the sale of a 5,082 acre estate at RM22,800 per acre and which was similar to the scheduled land. The said sale and purchase agreement dated 9 March 1994, was barely one week from the acquisition date. After giving due allowances, the appellants' valuer put the market value of the scheduled land at RM20,000 per acre which worked out to a total sum of RM51,628,000 for the acquired land.

[32] The learned judge rejected this evidence primarily on the ground that the said sale and purchase agreement was not produced by the appellants nor exhibited in the valuation report of the appellants (exh 'A'). There was no evidence of when the transaction took place if compared to comparison 1 where the transaction was stated clearly as 22 July 1990. The learned judge, in our view, was correct to say that in the absence of the said sale and purchase agreement, he was unable to examine the terms and conditions of the sale and purchase and further there was no evidence that the sale and purchase was carried into effect.

[33] We would add further that the parties to the said sale and purchase agreement were not known either. It then goes down to the issue of whether the said sale and purchase agreement was bona fide. Only when the agreements to purchase are bona fide and other tests applicable to actual sales are satisfied would the comparison give an indication of the market value, (see *Compulsory Acquisition of Land in India* by Aggarawala (1985) (5th Ed) at p 529, para 75 and *Sanjiva Row on Land Acquisition And Compensation* (7th Ed) 1984 at p 728). In the circumstances, the learned judge was not wrong in rejecting the evidence of the said sale and purchase agreement.

[34] Wong Chong Wah of counsel for the appellants further submitted that the learned judge erred in law and in fact by taking into consideration the first valuation report prepared by the appellants' same valuer for the purpose of the Securities Commission which was exhibited as exh 11 to the affidavit of the respondent's valuer dated 16 September 1995. The valuation was in respect of the whole of lots known as Ladang Kuala Muda and valued at RM7,040 per acre. In respect of the scheduled land which formed part of Ladang Kuala Muda, the area acquired was 2,581.4 acres and the market value was put at RM20,000 per acre by the second valuation report of the appellants.

[35] The learned judge observed that the period between the two valuation reports was around seven months and during this short period, the difference in the market value of the scheduled land was about RM13,000 per acre.

[36] There was no explanation for the apparent abrupt difference in the market value of the scheduled land. Further, there was no evidence either to show of any development in or around the area of the scheduled land.

In the interests of justice, the learned judge gave the appellants' valuer the opportunity to explain the apparent abrupt difference in the valuation of the scheduled land and adjourned the hearing to another date. However, at the continued hearing, the appellants' valuer did not turn up in court and no explanation was put forward by the appellants for the absence of their valuer.

[37] In the circumstances the learned judge, in our view, was entitled to state that the market value of the scheduled land should be RM7,040 per acre as per the first valuation report as opposed to the second valuation report putting the market value at RM20,000 per acre. Surprisingly though, the learned judge apparently failed to give adequate consideration to the first valuation report as it was clear that he was not influenced by it and merely, as it would appear, affirmed the award made by the respondent. It was therefore not correct for Wong Chong Wah of counsel for the appellants to contend that the learned judge erred in law and in fact in taking into consideration the first valuation report prepared for the purpose of the Securities Commission,

[38] Even assuming for a moment that the learned judge was influenced by the first valuation report which was for the purpose of the Securities Commission as contended by the appellants and relying on what Lim Beng Choon J said in *Petaling Rubber Estates Ltd v Collector of Land Revenue, Kedah* [1989] 3 MLJ 438 at p 444 — 'Hence such valuations can at the highest be utilized as an *informative guide* and not as an indication of the price which a willing seller would sell and a willing purchaser would buy the land in question', the acid test, in our view, was the method of valuation adopted by the valuer. We have examined in detail the first valuation report prepared by the appellants' valuer for the purpose of the Securities Commission. At p 155 of the appeal record, the appellants' valuer stated the purpose of the valuation and more importantly the basis of valuation and we quote:

> The basis of valuation, for the purposes of this report, is on OPEN MARKET VALUE. By OPEN MARKET VALUE is meant the best price at which the sale of an interest in a property might reasonably be expected to have been completed unconditionally for cash consideration on the date of valuation assuming:
>
> (a) a willing seller;
>
> (b) that prior to the date of valuation there had been a reasonable period (having regard to the nature of the property and the state of the market), for the proper marketing of the interest, for the agreement of price and terms and for the completion of the sale;
>
> (c) that the state of the market, level of values and other circumstance were, on any earlier assumed date of exchange of contracts, the same as on the date of valuation;
>
> (d) that no account is taken of an additional bid by a purchaser with a 'special interest'.

[39] The appellants' valuer used the same basis for the market value of the scheduled land for the purpose of the acquisition of the scheduled land in the second valuation report (p 130 of the appeal record). **A**

[40] It was thus clear that the basis of the valuation adopted for the purpose of the Securities Commission and for the acquisition purpose under the Act in this case was the same. It was urged upon us by Wong Chong Wah of counsel for the appellants that the two valuation reports should be treated differently in this case. With respect, we disagree. We must say that surely there cannot be one standard of valuation for the purpose of the Securities Commission and another standard for the acquisition purpose if clearly the method used for the two valuation reports in respect of the same land was the same, that is, the open market value and willing seller and willing buyer. For that matter, the two valuation reports were even prepared by the same valuer, that is, S Gopala Krishnan who was from the same firm. **B** **C**

[41] However, we wish to point out that the learned judge was not bound to accept the expert opinion of either party as to the market value in a land reference matter. In *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] MLJ 69, Buhagiar J in considering the evidence of experts at p 71 quoted with approval the case of *Harish Chundar Neogy v Secretary of State* 11 CWN 876 at p 877, 'estimates are undoubtedly some evidence but their value was not great, as expert opinion was liable to err, unless it was supported by, or coincides with, other evidence'. **D** **E**

[42] This observation has been adopted with approval by the Federal Court in *Alagappa Chettiar v Collector of Land Revenue, Kuala Lumpur* [1968] 1 MLJ 243 and *Ng Tiou Hong v Collector of Land Revenue, Gombak*.

[43] An opportunity was rightly given by the learned judge for the appellants to explain the apparent abrupt difference in the two valuation reports of the same valuer of the appellants as stated earlier but the appellants chose not to seize the opportunity to do so. Hence, there was no justification for the appellants to seek for an increase of the award to RM20,000 per acre. In the circumstances, we agree with the learned judge when he rejected the application for an increase to RM20,000 per acre for the scheduled land. **F** **G**

[44] In respect of the claim for injurious affection as provided under the First Schedule to the Act, the learned judge merely mentioned in passing that the appellants in addition thereto claimed for a sum of RM9,300 per acre under this category. The appellants were now claiming for this sum. With respect, the learned judge incorrectly stated that the claim was on a per acre basis as clearly from the second valuation report this was what the valuer stated (pp 138/139 of the appeal record): **H**

> However, an area of approximately 1.55 acres on Lot No 51 located immediately at the Southeast corner of the acquired site would be cut off from the remaining part of the estate and administration of this area would be difficult. We are, therefore, of the view that there would be a depreciation of about 30% of the open market value: **I**

Value of land before acquisition	RM 20,000 per acre
Value of land after acquisition	RM 14,000 per acre
Difference in value	RM 6,000 per acre
Area Affected	(x) 1.55 acres
Value of Injurious Affection	RM 9,300

[45] However, if we were to take the market value of the scheduled land before the acquisition as RM10,000 per acre, instead of RM20,000 per acre, the value of injurious affection, using the formula of 30% depreciation, would be around RM4,650 (half of RM9,3000).

[46] As this claim was not resisted by the respondent, such claim should have been considered by the learned judge. However, the amount to be considered depended on our decision in respect of the cross-appeal by the respondent.

Cross-appeal

[47] Pursuant to this court granting on 30 September 2002, leave to the appellants for extension of time to file the appeal against the judgment of the High Court, the respondent filed a motion on 25 October 2002 for leave of this court to file a cross-appeal out of time against the judgment of the High Court. On 16 June 2003, this court granted leave to the respondent to file and serve the cross-appeal. The cross-appeal was subsequently filed by the respondent on 25 June 2003.

[48] The crux of the appeal and the cross-appeal related to the primary issue of whether the amount of compensation awarded by the respondent and affirmed by the learned judge was reflective of the market value of the scheduled land as at 3 March 1994, the date of the publication of the Gazette under s 8 of the Act (para 1 of the First Schedule to the Act).

[49] The appellants contended that the market value of the acquired land should be RM20,000 per acre and not RM10,000 per acre as awarded. The respondent on the other hand disputed this and contended that the award of RM10,000 per acre was not reflective of the market value of the scheduled land. The onus then was on the respondent and this the respondent tried to do by adducing further evidence, that is, by relying on the four documents produced in the motion filed on 1 July 2003 in support of the cross-appeal.

[50] Before considering the merits of the cross-appeal, Wong Chong Wah of counsel for the appellants, whilst conceding that under s 49(1) of the Act the respondent has a right to file an appeal or cross-appeal against the judgment of the High Court, however, submitted that in the circumstances of this case, the respondent has no basis to file the cross-appeal. The circumstances referred to were:

(a) the award of RM10,000 per acre that was upheld and maintained by the High Court was made by the respondent himself. Reference was made to s 36(2) of the Act pertaining to reference to the High Court

by the respondent as the Land Administrator and s 37(1) of the Act pertaining to persons interested, which does not by the definition under s 2 include the Land Administrator;

(b) s 44 of the Act provides that the scope of the inquiry shall be restricted to a consideration of the interests of the persons affected by the objection and by definition 'person interested' would exclude the Land Administrator;

(c) s14(2) of the Act provides that the award of the Land Administrator shall be final and conclusive evidence of the area of any scheduled land, of its value in the opinion of the Land Administrator. The award of the Land Administrator was like an offer and bound the Government, as the Land Administrator was the agent of the Government.

[51] Wong Chong Wah of counsel for the appellants relied on *Compulsory Acquisition of Land in India* by Om Prakash Aggamwala at p 301 para 30; p 306 section 12, and cited *Hamidon bin Ahmad v Collector of Land Revenue, Jasin* [1970] 1 MLJ 202 at pp 204 and 205 and *Ezra v Secretary of State for India* (1905) ILR 32 Cal 605 (Privy Council) at pp 619, 620, 626 and 629, in support thereof.

[52] However, we wish to respectfully say that the facts of this case and what was relied on by Wong Chong Wah of counsel for the appellants as stated above were different. If the appellants had not taken the further steps pursuant to s 37 of the Act to apply to the High Court objecting to the amount of compensation awarded then, in our view, the matter rests there and the respondent cannot proceed further. In other words, the respondent as the Land Administrator could not invoke s 37 of the Act. The award made by the Land Administrator was then final and conclusive and was therefore binding on the Government subject to the total amount of any award not exceeding RM15,000 otherwise the Government or any person or corporation on whose behalf the scheduled land was acquired pursuant to s 3 of the Act shall be deemed to be a person interested under sub-s (1) of s 37 and may make objection on any of the grounds specified in sub-s (1) thereof. It would be helpful to quote s 37 as follows:

37 Application to Court

(1) Any person interested in any scheduled land who, pursuant to any notice under section 10 or 11, has made a claim to the Land Administrator in due time and who has not accepted the Land Administrator's award thereon, or has accepted payment of the amount of such award under protest as to the sufficiency thereof, may, subject to this section, make objection to -

(a) the measurement of the land;

(b) the amount of the compensation;

(c) the persons to whom it is payable;

(d) the apportionment of the compensation.

(2) Where the total amount awarded in compensation in respect of any interest in any scheduled land does not exceed three thousand ringgit the written award of the Land Administrator shall be final with regard to both the measurement of the

land and the amount of compensation awarded, and no objection may be made under sub-s (1) in respect thereof.

(3) Where the total amount of any award in respect of any scheduled land exceeds fifteen thousand ringgit any Government or any person or corporation undertaking a work which in the opinion of the State Authority is of public utility, and on whose behalf such land was acquired pursuant to s 3, shall be deemed to be a person interested in any scheduled land under sub-s (1), and may make objections on any of the grounds specified in subsection (1).

[53] To that limited extent, Wong Chong Wah of counsel for the appellants may be right. Since in this case, the appellants proceeded to file an appeal against the judgment of the High Court, the respondent was entitled to file an appeal or a cross-appeal. This right was amply given to the respondent by way of s 49(1) of the Act and rightly conceded to by Wong Chong Wah of counsel for the appellants. Section 49(1) of the Act reads:

Any person interested, *including the Land Administrator* and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3, may appeal from a decision of the Court to the Court of Appeal and to the Federal Court'. (Emphasis added.)

[54] We would, however, wish to say that without the benefit of the further evidence, the respondent would be hard put to cross-appeal as the sum of RM10,000 per acre was the sum awarded by the respondent as the Land Administrator.

[55] In this respect, the Privy Council in *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43 per Lord Diplock stated at p 44:

Although upon referring an objection to the High Court for its determination the collector is required to state the grounds on which the amount of compensation was determined, *the reference to the High Court is not in the nature of an appeal for the collector's award. It is in the nature of an original hearing in which the applicant is the plaintiff and the collector the defendant*. (Emphasis added.)

[56] We agree with what Lord Diplock said as to the status of the parties before the High Court in matters pertaining to acquisition of lands under the Act. As the reference to the High Court was not in the nature of an appeal but in the nature of an original hearing, it must necessarily follow that the award given by the respondent was not binding on the High Court though it would be final and binding on the Government if there was no reference to the High Court under s 37 of the Act. Similarly, the evidence of estimates of value by experts were undoubtedly some evidence but too much weight should not be given unless it was supported by, or coincides with, other evidence. In other words, the High Court was not bound by the expert valuation of the acquired land (*Ng Tiou Hong v Collector of Land Revenue, Gombak*). The safest guide would be the sales of the same land or similar land in the neighbourhood, after making due allowance for all the circumstances (*Nanyang Manufacturing Co v The Collector of Land Revenue, Johore*).

[57] As stated earlier on, by consent of the parties, the following documents were allowed to be put in by the respondent in support of the cross-appeal:

(a) the sale of estates, other assets and shares agreement dated 8 October 1993 between the first appellant and the Kuala Sidim Rubber Company Bhd ('the Sale and Purchase Agreement');

(b) the first appellant's circular to its shareholders dated 23 February 1994 ('MB's circular');

(c) Kuala Sidim Rubber Company Bhd's circular to its shareholders dated 3 March 1994 ('KSB's Circular');

(d) the official Land Title Search Reports for Lot No 14215 (old Lot No 8065) and 18479.

[58] It was not disputed that the above said documents were not produced either in the inquiry before the respondent nor before the High Court. The issue here was whether the said documents were relevant for the purpose of considering the cross-appeal. The respondent contended that they were relevant and not available to the respondent at the time of the inquiry and the High Court proceedings. Reasons were put forward by the respondent in the affidavits in support of the motion to adduce further evidence. It would appear that the said documents were available and within the knowledge of the appellants, or at least the first appellant, at the material time. Hence, it was alleged by the respondent that there was suppression or deliberate suppression of the said documents which form the subject matter of the cross-appeal. The appellants contended the said documents were irrelevant and need not be produced. The appellants denied the claim of suppression or deliberate suppression of the said documents and submitted that the first valuation report of the appellants was put in before the High Court by the respondent's valuer by way of exh 'D'. According to the appellants, its first valuation report was in respect of valuation of the scheduled land for the purpose of the Securities Commission. The point missed by the appellants was that the said documents were relevant to show in detail the purpose of the submission of the report to the Securities Commission. In other words, the first valuation report before the High Court was not complete without the said documents now produced by the respondent. This was supported by the second affidavit of the respondent through Azmi bin Abdul Latif dated 7 July 2003, that he was not able to ascertain the actual purpose for which the appellants' first valuation report was commissioned other than that it was submitted for the purpose of the Securities Commission.

[59] Azmi bin Abdul Latif further averred that he was the one who put in the appellant's first valuation report to show the abrupt and unexplained increase in the market value of the scheduled land by about RM3,000 per acre within a space of seven months intervening between the first valuation report and the second valuation report of the appellants.

[60] Azmi bin Abdul Latif further averred that he came to know of the existence of the said documents through the State Legal Adviser, Kedah.

[61] The Sale and Purchase Agreement between the first appellant and Kuala Sidim Rubber Company Bhd in respect of the undivided half share of the scheduled land acquired was produced in a related proceedings in the High Court, Alor Setar vide originating summons No 24–358–1995 pursuant to s 29(2) of the Act. Kuala Sidim Rubber Company Bhd put up a claim for the compensation money of the undivided 1/2 share as they bought the undivided 1/2 share from the first appellant and therefore the Land Administrator should not have paid to the first appellant, through its managing agents, Boustead Estates Agency Sendirian Bhd ('Boustead') vide letter dated 9 April 1995 by way of a OCBC Bank cheque No 006212 for the sum of RM12,907,000 as compensation (half share). In other words, Kuala Sidim Rubber Company Bhd claims that the compensation should rightly be paid to them.

[62] By letter dated 10 April 1995, Kuala Sidim Rubber Company Bhd through Boustead indicated to the Land Administrator of its intention to apply to the court to set aside the compulsory acquisition of the scheduled land and returned the said cheque to the Land Administrator. Subsequently, a writ of summons was filed in the Alor Setar High Court vide suit No 22–32–1995 to set aside the compulsory acquisition of the scheduled land but on 28 June 1995 the said suit was struck off and Kuala Sidim Rubber Company Bhd did not pursue the matter any further.

[63] All the above facts were disclosed in the affidavit of Ahmad Azhar Shah bin Ibrahim, the Legal and Administrative Manager of Boustead dated 21 May 1999 and exhibited as ZBH-10 to the first affidavit of the respondent in support of the motion to adduce further evidence.

[64] According to the affidavit of Azmi bin Abdul Latif (the second affidavit of the respondent), he personally visited the Pejabat Tanah dan Galian Kedah and conducted official land title searches on the titles of the scheduled land ie, Grant No 8566 (Lot No 14215) (old Lot No 8065) and Grant No 19129 (Lot No 18479) and in the course of the searches he did not come across or sight of the Sale and Purchase Agreement. The Sale and Purchase Agreement was only disclosed indirectly on 21 May 1999 by the affidavit of Ahmad Azhar Shah bin Ibrahim vide Originating Summons No 24–358–1995 (exh ZBH-10).

[65] According to the affidavit of Zabudin bin Hat dated 30 June 2003 in support of the motion, the transfer of the first appellant's half share of the scheduled land to Kuala Sidim Rubber Company Bhd was registered only on *20 April 1999* with the Registrar of Land and Mines, Kedah, ie about five years later, (see exhs ZBH-13 and ZBH-14). During the inquiry proceedings by the respondent that started on 25 May 1994 the Sale and Purchase Agreement was executed on 8 October 1993 and completed on 21 March 1994 and therefore it should have been disclosed by the first appellant at the inquiry proceedings, if not at the High Court proceedings. The appellant's first valuation report for the purpose of the Securities

Commission did not also disclose the Sale and Purchase Agreement and the other documents now put in by the respondent. Why the documents were not produced when they were available, only the appellants, or at least the first appellant, can provide the answer. The appellants merely contended that these documents were not relevant for the purpose of the acquisition. With respect, we disagree.

[66] We were of the view that the Sale and Purchase Agreement and the other documents in respect of the scheduled land were material evidence for the purpose of assessing the market value by the Land Administrator and the High Court especially when there was evidence of sale of half of the scheduled land and the basis of the market value of its sale. The issue now was what was the market value of the scheduled land?. We have two figures here. From the appellant's first valuation report, it was assessed at RM7,040 per acre. According to the Sale and Purchase Agreement, the purchase price on a willing buyer and willing seller basis was RM6,596 per acre. This purchase price was based on a discount of 6.3% of the open market value of RM7,040 per acre. We were, however, not clear as to the reasons for the discount given for the purchase of the scheduled land. We wish to say, however, that it was common knowledge that it was not easy to get a willing buyer for a large estate as in this case and the discount given was in all probability for the sale to carry through. According to KSB's circular to its shareholders in respect of the purchase consideration of the estates including half interest in Kuala Muda Estate (scheduled land) 'we are of the view that the basis in arriving at the purchase price consideration was fair and reasonable', (pp 202 and 203 of exh ZBH-3).

[67] Be that as it may, the two valuation reports of the appellants bear the following similarities:

(a) both valuation reports were prepared by Messrs Azmi & Co Sdn Bhd;

(b) the subject matter of the valuation in each report was the Kuala Muda Estate;

(c) all of the lands in question were the same agricultural/estate lands;

(d) their respective purpose, to establish an estimate of market value of the lands;

(e) the basis of valuation, in both reports, was on 'an open market value' assuming a 'willing buyer-willing seller' situation;

(f) both reports took into account the development potential of the lands in question; and

(g) the method of valuation adopted in both reports was the comparison approach.

[68] It was thus clear to us that for reasons best known to the appellants, or at least the first appellant, the Sale and Purchase Agreement, MB's circular and KSB's circular were not disclosed though the documents were available.

[69] Had the learned judge the benefit of the documents produced by way of the additional evidence in support of the respondent's cross-appeal, the learned judge could very well have not affirmed the award of RM10,000 per acre.

[70] As the learned judge's valuation of the market value of the scheduled land was based on the valuation reports of both parties before him and no oral evidence was adduced, the appellate court was entitled to review the valuation reports and to consider the additional evidence which, by consent, was allowed by us (see *Collector of Land Revenue v Alagappa Chettiar, Kuala Lumpur*).

[71] One of the recognized methods of valuation of land acquired under the land acquisition legislation was the price paid, within a reasonable time, in bona fide transactions of purchases of the land acquired, or of the lands adjacent to the land acquired and possessing similar advantages (*Nanyang Manufacturing Co v The Collector of Land Revenue, Johore*).

[72] In this case by way of the additional evidence, it was clear to us there was the Sale and Purchase Agreement of the scheduled land at a price of RM6,596 per acre (after discounting the market value of RM7040 per acre). In fact, there was uncontroverted evidence that the purchase consideration was on willing seller and willing buyer basis. The Sale and Purchase Agreement was executed on 8 October 1993 and completed on 21 March 1994. The price was based on the open market value by the appellant's valuer at RM45,000,000 on the basis of the market value of RM7,040 per acre. We can therefore accept that the market value of the scheduled land was RM7,040 per acre according to the first valuation report of the appellants. This was about seven months earlier than the date of the acquisition, that is, 3 March 1994.

[73] It would seem clear to us that in view of the proximity of time between the Sale and Purchase Agreement of the scheduled land and the date of the acquisition of the scheduled land, the Sale and Purchase Agreement provides the best guide for assessment of the market value of the scheduled land after making due allowance for all the circumstances. Suffian J (as he then was) cited with approval in *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd* [1966] 1 MLJ 243 at p 247 the following passage from the judgment of Buhagiar J in *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore*:

> 'I consider that the safest guide to determine the fair market value is evidence of *sales of the same land* or similar land in the neighbourhood, after making due allowance for all the circumstances.' (Emphasis added.)

[74] As we were of the view that the said documents admitted as additional evidence were relevant for the purpose of assessing the market value of the scheduled land and for the reasons stated earlier, the respondent's award and the High Court order affirming it should be set aside.

[75] It now remains for us to do the best we can to arrive at a just assessment of the market value of the scheduled land. The Sale and

Purchase Agreement of the scheduled land was executed on 8 October 1993, well before the acquisition date and there was an intervening period of seven months, we then need to take into consideration, inter alia, the element of appreciation of the scheduled land. Having said that, the sale of the scheduled land to Kuala Sidim Rubber Company Bhd provides the best guide to assess the market value of the scheduled land and making the necessary adjustments of comparable sales of adjacent or similar lands and also making due allowances for all the circumstances, we were of the view that a fair market value of the scheduled land was RM7,500 per acre.

[76] Having determined the fair market value of the scheduled land, we now need to consider the claim for injurious affection. As we have stated earlier on, the learned judge merely mentioned this claim without considering it. The respondent has not challenged this claim either. Therefore the appellants, in our view, were entitled to succeed under this claim. The question was what was the amount that the appellants were entitled to claim? As we have determined the fair market value of the scheduled land at RM7,500 per acre and taking the basis of the claim on the formula of 30% depreciation of the value of the scheduled land, the amount for the injurious affection would work out to around RM5,000.

Orders

[77] In the circumstances, we made the following orders:

(a) the appeal for increase of the award to RM20,000 per acre was dismissed. However, we awarded a sum of RM5,000 for injurious affection;

(b) the cross-appeal was allowed and the award was reduced from RM10,000 per acre to RM7,500 per acre;

(c) the difference in the sum between RM10,000 per acre and RM7,500 per acre to carry interest at 8%pa from the date of full payment to the appellants to the date of settlement as per the order of this court;

(d) as the amount awarded by the High Court was substantially reduced by this court, we ordered the costs of the appeal and the cross-appeal to the respondent. The deposit by the appellants was to go towards the taxed costs and the deposit by the respondent, if any, was to be refunded;

(e) in respect of costs of the motion, there would be no order as to costs as the appellants consented to it.

Appeal allowed in part by making an award of RM5,000, appeal dismissed for an increase of the award, cross appeal allowed and award reduced to RM7,500 per acre.

Reported by Sivapragasam Kumaran